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Forty-first session

Summary record of the 917th meeting

Held at Headquarters, New York, on Thursday, 1 July 2010, at 10 a.m.

Chairperson: Ms. Sabo (Vice-Chairperson) ..... (Canada)
later: Mr. Wisitsora-at (Vice-Chairperson) ..... (Thailand)

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The meeting was called to order at 10.15 a.m.

Election of officers (*continued*)

1. **The Chairperson** said that the delegation of Japan, on behalf of the Asian Group, seconded by the delegation of Singapore, had nominated Mr. Wisitsora-at (Thailand) for the office of Vice-Chairperson of the forty-third session of the Commission.

2. *Mr. Wisitsora-at (Thailand) was elected Vice-Chairperson by acclamation and took the Chair.*

Finalization and adoption of part three of the UNCITRAL Legislative Guide on Insolvency Law on the treatment of enterprise groups in insolvency
(A/CN.9/699 and Add.1-4, and A/CN.9/708; A/CN.9/WG.V/WP.92 and Add.1)

3. **Ms. Clift** (International Trade Law Division) said that the Commission had before it documents A/CN.9/WG.V/WP.92 and Add.1, which set out the draft commentary and recommendations of part three of the Legislative Guide on Insolvency Law, along with document A/CN.9/708, which set forth amendments and additions to that draft, and a number of other documents containing comments by States and intergovernmental and non-governmental organizations (A/CN.9/699 and Add.1-4).

Document A/CN.9/WG.V/WP.9

4. **The Chairperson** said that, if he heard no objection, he would take it that the Commission wished to adopt document A/CN.9/WG.V/WP.92, as revised by document A/CN.9/708.

5. **Ms. Clift** (International Trade Law Division) drew attention in particular to the expanded text proposed in the revised text for paragraph 26.

6. *Document A/CN.9/WG.V/WP.92, as revised by document A/CN.9/708, was adopted.*

Document A/CN.9/WG.V/WP.92/Add.1

7. **Mr. Boulos** (Egypt) suggested that, in the third line of paragraph 28, the word "may" should be replaced by "will", since, once a communication was recorded, it must necessarily form part of the record.

8. **The Chairperson** said that, to his recollection, "may" had been adopted as a compromise: in some countries, communications were not required to form part of the record. If the word were changed in that paragraph, it would also have to be changed in paragraph 243 (d).

9. **Mr. Cooper** (Observer for the International Association of Restructuring, Insolvency and Bankruptcy Professionals (INSOL)) said that at the judicial colloquia it had been reported that in some jurisdictions there was concern about the status of court-to-court communications. The consensus seemed to be that where there were parallel proceedings in two jurisdictions, as opposed to joint hearings, recordings would be made in accordance with the rules of the courts of those jurisdictions. The original wording was therefore to be preferred.

10. **Mr. Lifland** (United States of America), supported by **Mr. Ghia** (Italy), said the issue was a domestic one, determined by each country. The wording should therefore be left unchanged so as to ensure the maximum flexibility.

11. **The Chairperson** said that he took it that there was no support for the Egyptian proposal.

12. **Ms. Clift** (International Trade Law Division) said that changes had been proposed by the Working Group following its review of the document. At the end of recommendation 242, after "members of that enterprise group", and at the end of recommendation 248, after "enterprise group", the words: "to facilitate coordination of those proceedings" should be added; and in paragraph 243 (c), the words "and claims" should be deleted.

13. **The Chairperson** said he took it that the Commission agreed to those changes.

14. *Document A/CN.9/WG.V/WP.92/Add.1, as revised by A/CN.9/708 and as orally amended, was adopted.*

The meeting was suspended at 11.15 a.m. and resumed at noon.

Draft decision on adoption of part three of the UNCITRAL Legislative Guide on Insolvency Law (A/CN.9/XLIII/CRP.6)

15. **The Chairperson** drew attention to the draft decision contained in document A/CN.9/XLIII/CRP.6, which, once adopted, would be reproduced in part three of the Guide.

16. **Mr. Morán Bovio** (Spain), referring to the Spanish version of the text, said that the word "quebrar" in the third preambular paragraph might not be the most appropriate word for the English term "fail".

17. **Mr. Bellenger** (France), referring to the French version of the text, said that the expression "sujet de droit" in the fourth preambular paragraph should be replaced with an expression such as "entité juridique", which was closer to the term "legal entity" used in the English text.

18. **The Chairperson** suggested that the secretariat should be requested to adjust the French and Spanish versions of the text accordingly.

19. *It was so decided.*

20. **Mr. Redmond** (United States of America) suggested adding a new paragraph 5 along the following lines: "*Recommends also* that all States consider the implementation and use of the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation."

21. **Mr. Morán Bovio** (Spain), welcoming the United States proposal in principle, said that the Practice Guide could not be "implemented" as such because it was not a text that gave rise to legislative initiatives; rather, it was intended to be used as a basis for negotiations between parties to cross-border insolvency proceedings. It might be better simply to draw attention to the Practice Guide or to recommend that States should take it into consideration where appropriate.

22. **The Chairperson** suggested that the wording of the proposed new paragraph should be based on paragraph 3 of General Assembly resolution 64/112, in which the Assembly recommended that the Practice Guide should be given due consideration, as appropriate, by judges, insolvency practitioners and other stakeholders involved in cross-border insolvency proceedings.

23. **Mr. Oh** Soo-geun (Republic of Korea) expressed support for the inclusion of an additional paragraph, provided that appropriate wording could be found. Perhaps it would be acceptable to refer to "use" of the Practice Guide.

24. **Ms. Leblanc** (Canada) said that her delegation supported the United States proposal but shared the concerns expressed by the representative of Spain. She proposed the following wording for a new paragraph 5: "*Recommends also* that all States continue to consider encouraging reference to and use, where practicable, of the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation."

25. **Ms. Sanderson** (United Kingdom), supported by **Ms. Smyth** (Australia), agreed that it was important to take the opportunity to remind States of the existence of the Practice Guide. Her delegation favoured wording based on resolution 64/112, as suggested by the Chairperson.

26. **The Chairperson** suggested the following wording for the proposed new paragraph 5: "*Recommends* also that the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation continue to be given due consideration, as appropriate, by judges, insolvency practitioners and other stakeholders involved in cross-border insolvency proceedings."

27. **Mr. Redmond** (United States of America) expressed support for that suggestion.

28. *The draft decision contained in document A/CN.9/XLIII/CRP.6, as amended, was adopted.*

Possible future work in the area of insolvency law
(A/CN.9/582/Add.6, A/CN.9/691 and A/CN.9/709; A/CN.9/WG.V/WP.93 and Add.1-6)

29. **Ms. Clift** (International Trade Law Division) said that Working Group V, in its report on its thirty-eighth session (A/CN.9/691), had recommended that activity should be initiated on two insolvency topics: a proposal by the United States of America on the Model Law on Cross-Border Insolvency relating to the centre of main interests and the development of a model law on insolvency (A/CN.9/WG.V/WP.93/Add.1); and proposals by the United Kingdom (A/CN.9/WG.V/WP.93/Add.4), the International Association of Restructuring, Insolvency and Bankruptcy Professionals (INSOL International) (A/CN.9/WG.V/WP.93/Add.3) and the International Insolvency Institute (A/CN.9/582/Add.6) concerning the responsibility and liability of directors and officers in insolvency and pre-insolvency cases. The Working Group had also suggested that the secretariat might be requested to monitor work on cross-border insolvency in the case of large financial institutions. Switzerland had submitted a proposal in that connection (A/CN.9/709).

30. **Mr. Burman** (United States of America) noted that the proposals put forward in Working Group V on directors' and officers' liabilities, and that put forward by his own delegation on international insolvency law, had met with widespread support. His delegation supported the recommendations made in that regard.

31. **Mr. Schoefisch** (Germany) said that the responsibility and liability of officers was a matter of liability law rather than insolvency law, and therefore should not be a topic of discussion in the Commission. However, his delegation supported the United States proposal regarding the centre of main interests, and the possible development of associated principles.

32. **Mr. Morán Bovio** (Spain) said that his delegation fully endorsed the views expressed by the representative of Germany. It was difficult to determine the scope of the responsibility of directors and officers in general and in situations of insolvency in particular. It was not possible to consider the situation only at the time of bankruptcy, it would need to be considered over some indeterminate time frame prior to insolvency, during which the responsibility of directors and officers would also need to be considered, as being just as great as during insolvency. It would be difficult to determine the limits. However, his delegation saw merit in the United States proposal.

33. **Mr. Kuhn** (Observer for Switzerland) noted that his delegation's proposal for a study on insolvency affecting large financial institutions had not thus far generated sufficient support for inclusion in the Commission's agenda, and that the attendant policy issues were under consideration in other bodies. The proposal was for a study focusing on cross-border cooperation, as essential for the orderly resolution of such cases. The normal approach to such cooperation would be to conclude a treaty on insolvency measures, but that did not appear feasible at the global level, so that the study should look at alternative means. The study should be confined to technical issues. While policy issues were better dealt with elsewhere, such as in the Basel Committee on Banking Supervision, the Commission was the only body competent to consider the technical aspects, and had an important role to play in an issue of vital concern.

34. **Ms. Sanderson** (United Kingdom) said, with regard to the comments on directors' duties, that a company did not necessarily become insolvent on the day it made a formal declaration of insolvency. A company was likely to be effectively insolvent before any formal declaration of insolvency was made.

35. In reality the duty of the directors and officers to behave responsibly, and to have regard not only for the interests of shareholders but also of creditors, was all the more important as a company approached insolvency, even if formal insolvency proceedings had not yet begun. That meant that prior to formal insolvency directors and officers should take account of the interests of creditors, and that it was a matter that the Commission could usefully consider, including by defining the point at which a business became insolvent and by setting limits on the actions of directors, in the interest of better behaviour within the business community.

36. **Ms. Smyth** (Australia) said that her delegation supported Working Group V's recommendations that work should proceed on the United Kingdom and United States proposals; in that regard, she endorsed the remarks made by the representative of the United Kingdom. The liability of directors and officers was a particularly important topic, and constituted a fundamental aspect of insolvency frameworks. Companies should be encouraged to enter into insolvency administration at an appropriate juncture if such frameworks were to be successful.

37. **Mr. Cooper** (Observer for the International Association of Restructuring, Insolvency and Bankruptcy Professionals (INSOL)) said that the importance of restructuring had never been greater. Most countries had legislation providing for the restructuring of financially troubled companies. Effective use of such laws required insolvency proceedings to be started as early as possible, when more options were available. In practice, it was often left to creditors to commence what were liquidation proceedings, because directors had failed to act. One highly undesirable development was that directors "forum shopped", commencing proceedings in jurisdictions with less onerous requirements. The issue of directors' obligations when a company was becoming insolvent certainly fell within the purview of the Commission.

38. **Mr. Mokal** (World Bank) said that while the World Bank supported both the United States and United Kingdom proposals, it had a particular preference for the latter in the context of its work in developing and emerging markets. In virtually all the

jurisdictions in which the World Bank was engaged, the issues touched on by the representative of INSOL International were key. It was essential for legal systems to create incentives for directors and officers to take the right steps at the right time, and the proposals on liability put forward by the United Kingdom were highly relevant. It would assist the World Bank in its own work of suggesting improvements in legislation on liability if the Commission laid down standards on international best practice in that domain.

39. Regarding the Swiss proposal, it was crucial to ensure coherence and harmonization in the treatment of bank resolutions. However, the World Bank had reservations about the timing of the proposal, and the appropriateness of the Commission as a forum.

40. Regarding timing, in many jurisdictions insolvency of enterprises was dealt with by a specialist government department, whereas bank resolutions were dealt with by the banking regulator, typically the central bank. Yet central banks were, and in the immediate future would remain, heavily engaged in stabilizing the financial and banking sectors. To request their participation in consideration of bank resolutions would be an excessive demand. Moreover, other institutions, the World Bank and the International Monetary Fund (IMF) in particular, were seeking to ensure coordination among banking regulators, identify best practice and formulate guidance. For the Commission to embark on consideration of the topic at the current juncture might well prove an obstacle to their work. Thus, while the topic was important, and the Commission had a role to play in due course, the Swiss proposal was inopportune.

41. **Ms. Liu** Yan (International Monetary Fund) said that IMF supported the proposals put forward by the United States and the United Kingdom. Regarding the Swiss proposal, there was a need for international action on cross-border bank insolvency arrangements. However, several bodies were engaged in that area, including IMF itself. The Commission, though, had a comparative advantage in many aspects, including private law issues, and could make an important contribution to the development of an international framework for cross-border bank resolution. The various proposals being put forward in different bodies were still at an early stage, and it would be premature to delineate the Commission's role. IMF, and other bodies, were about to submit proposals to the Group of Twenty. Further discussion of the principal features of an international resolution framework was necessary to determine the way forward.

42. **Mr. Ghia** (Italy) said that his delegation supported the United Kingdom and United States proposals. Misconduct and malpractice by directors and officers had an international impact, and had resulted in thousands of redundancies worldwide in recent years. Guidance by the Commission on insolvency, on when and how to replace company directors and officers, and on restructuring, was of vital importance in international insolvency and in avoiding forum shopping.

The meeting rose at 1 p.m.